# United Overseas Bank (China) Ltd, Chengdu Branch v Siow Kwang Joon @ Siow Kwong Shang

HIGH COURT (JOHOR BAHRU) — CIVIL SUIT NO JA-22NCC-22–04 OF 2019
EVROL MARIETTE PETERS JC
20 JANUARY 2021

*Civil Procedure — Stay of execution of judgment — Stay of execution pending appeal — Application by defendant — Stay of execution pending appeal — Special circumstances — Whether a lack of reciprocal enforcement of judgement between Malaysia and China amounted to special circumstances*

This was an application in encl 95 by the defendant for a stay of execution of the judgement obtained by the plaintiff, pending appeal. The plaintiff, a licensed Chinese financial institution had granted financing facilities to a Chinese company FCGC for an amount of to RMB92.5m. The defendant was a director of FCGC, and had an interest in it through his company, Foh Chong & Sons Sdn Bhd, where he was a shareholder. The defendant executed a personal guarantee dated 9 May 2014 ('the guarantee') to secure repayment of the FCGC facilities. FCGC defaulted in the FCGC facilities since 31 January 2015, and in February 2019, the plaintiff called on the defendant's obligation under the guarantee. The then plaintiff filed the writ and statement of claim on 30 April 2019, and subsequently applied for summary judgment which was granted on 25 June 2020. The defendant filed an appeal against the decision and subsequently this application.

**Held**, allowing the application with costs of RM5,000 subject to allocator fees:

(1) Any application for stay was not an automatic right, but rather was left to the discretion of the court, which must have in mind the right of the successful party not to be deprived of its fruits of litigation until an appeal was determined, unless the unsuccessful party can show special circumstances to justify it. What may amount to special circumstances was a question of fact in each case (see paras 8–9).

(2) It was undisputed that the plaintiff was a foreign company incorporated under the laws of the People's Republic of China ('China') without assets in Malaysia. There was no reciprocal enforcement of judgment agreement between China and Malaysia and this was evident from a perusal of the First Schedule to the Reciprocal Enforcement of Judgments Act 1958. Therefore, there was indeed a real risk that the

defendant would not be able to recover the judgment sum from the plaintiff in China, in the event he was successful in the appeal (see para 13).

**[Bahasa Malaysia summary**

Ini merupakan satu permohonan dalam kandungan 95 oleh defendan untuk penangguhan perlaksanaan menantikan rayuan. Plaintif merupakan satu institusi keewangan berlesen China yang memberikan fasiliti pembiayaan kepada satu syarikat China FCGC untuk jumlah RMB92.5 juta. Defendan merupakan pengarah FCGC, dan mempunyai kepentingan di dalamnya melalui syarikatnya, Foh Chong & Sons Sdn Bhd yang mana dia merupakan seorang pemegang saham. Defendan telah melaksanakan satu jaminan peribadi bertarikh 9 Mei 2014 untuk menjamin pembayaran fasiliti FCGC. FCGC telah ingkar dengan fasiliti FCGC sejak 31 Januari 2015 dan dalam Februari 2019 plaintif telah memohon obligasi defendan di bawah jaminan. Plaintif kemudiannya memohon untuk penghakiman terus yang telah dibenarkan pada 25 Jun 2020. Defendan memfailkan satu rayuan terhadap keputusan tersebut dan dengan itu, permohonan ini.

**Diputuskan**, membenarkan permohonan dengan kos RM5,000 tertakluk kepada fi alokatur:

(1) Apa-apa permohonan untuk penggantungan bukan satu hak automatik, akan tetapi diserahkan keapda budi bicara mahkamah, yang harus mengambil kira hak pihak yang berjaya untuk tidak dihalang daripada menerima hasil litigasinya sehingga satu rayuan diputuskan. Kecuali mana pihak yang berjaya dapat menunjukkan keadaan khas untuk memberi justifikasi kepadanya. Apa yang akan terjumlah kepada keadaan khas adalah satu persoalan fakta dalam setiap kes (lihat perenggan 8–9).

(2) Ianya tidak dinafikan bahawa plaintif merupakan satu syarikat asing yang ditubuhkan dibawah undang-undang Republik Rakyat China ('China') tanpa aset di Malaysia. Tiada perjanjian perlaksanaan kehakiman bersama antara China dan Malaysia dan ini adalah jelas daripada penelitian Jadual Pertama Akta Penguatkuasaan Penghakiman Timbal Balik 1958. Oleh itu, wujud risiko bahawa defendan tidak akan dapat mendapatkan semula jumlah penghakiman daripada plaintif di China sekiranya beliau berjaya di peringkat rayuan (lihat perenggan 13).]

**Cases referred to**

*BMI Building Material International GMBH v Roberto Building Material Pte Ltd* [1999] 2 SLR 39, CA (refd)

*Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd* [2004] 1 MLJ 257, FC (refd)

*Rosengrens Ltd v Safe Deposit Centres Ltd* [1984] 3 All ER 198, CA (refd)

*Serangoon Garden Estate Ltd v Ang Keng* [1953] MLJ 116, HC (refd)
*Leong Poh Shee v Ng Kat Chong* [1966] 1 MLJ 86 (refd)

**Legislation referred to**

Courts of Judicature Act 1964 s 73
Reciprocal Enforcement of Judgments Act 1958 First Schedule
Rules of Court 2012 O 55 r 16

*Andrew Chiew Ean Vooi (Nicola Tang Zhan Ying with him) (Lee Hishammuddin Allen & Gledhill) for the plaintiff.*
*Ranjit Singh (KC Tho wtih him) (KC Tho) for the defendant.*

**Evrol Mariette Peters JC:**

INTRODUCTION

**[1]** This is an application ('this application') in encl 95 by the defendant for a stay of execution of the judgment obtained by the plaintiff in June 2020.

THE BACKGROUND FACTS

**[2]** The plaintiff, a licensed Chinese financial institution, by way of two letters of offer dated 27 December 2012 and 9 May 2014, granted financing facilities to a Chinese company, Foh Chong (Guangxi) Chemical Co Ltd ('FCGC'), for an amount up to RMB92.5m ('FCGC facilities').

**[3]** The defendant is a director of FCGC, and has an interest in it through his company, Foh Chong & Sons Sdn Bhd, where he is a shareholder. The defendant executed a personal guarantee dated 9 May 2014 ('the guarantee') to secure repayment of the FCGC facilities. FCGC defaulted in the FCGC facilities since 31 January 2015, and in February 2019, the plaintiff called on the defendant's obligation under the Guarantee.

**[4]** The plaintiff filed the writ and statement of claim on 30 April 2019, and subsequently applied for summary judgment. On 25 June 2020, an order for summary judgment was made against the defendant for the amount owing pursuant to the FCGC facilities. The defendant filed an appeal against that decision ('the appeal').

**[5]** On 12 August 2020, the defendant filed this application, which was allowed for the following reasons.

A THE LAW

**[6]** The starting point for any application for stay is s 73 of the Courts of Judicature Act 1964 and O 55 r 16 of the Rules of Court 2012. The provisions read:

B

> s 73 — *Appeal not to operate as stay of execution*
>
> *An appeal shall not operate as a stay of execution* or of proceedings under the decision appealed from unless the court below or the Court of Appeal so orders and no intermediate act or proceeding shall be invalidated except so far as the Court of
C Appeal may direct.
>
> ...
>
> O 55 — *Appeals to high court from subordinate courts*
>
> r 16 — *Stay of execution*
>
> D (1) *An appeal shall not operate as a stay of execution* under the decision appealed against ...
>
> (2) The Court appealed from or the High Court may grant an order of stay of execution on such terms as it thinks fit. (Emphasis added.)

E

**[7]** This was restated in the landmark case of *Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd* [2004] 1 MLJ 257 ('Kosma Palm Oil').

F **[8]** This is an important curtain raiser to any application for stay as it is not an automatic right, but rather is left to the discretion of the court, which must have in mind the right of the successful party not to be deprived of its fruits of litigation. Reference on this point is made to *Kosma Palm Oil*, *Serangoon Garden Estate Ltd v Ang Keng* [1953] MLJ 116, and *Leong Poh Shee v Ng Kat*
G *Chong* [1966] 1 MLJ 86.

**[9]** The court, therefore, will not deprive a successful party of the fruits of his litigation until an appeal is determined, unless the unsuccessful party can show special circumstances to justify it. What may amount to special
H circumstances is a question of fact in each case.

**[10]** In order for the court to exercise its judicial discretion to grant a stay of execution, the defendant has to demonstrate the existence of special circumstances. This was clarified by the Federal Court case of *Kosma Palm Oil*,
I which held that:

> It is therefore clear beyond doubt that there are many factors that may constitute special circumstances and the fact that an appeal would be rendered nugatory if stay was refused is the most common one. It is an example of special circumstances. In other words special circumstances is the genus of which nugatoriness is a species. If

it has been shown that an appeal would be rendered nugatory if stay was refused what it means is that a special circumstance has been established. Thus they cannot be treated as separate heads and one cannot be an alternative to the other. Neither can one be accepted or rejected in favour of the other as they are inter-related.

...

The onus is on the applicants to demonstrate the existence of special circumstances to justify the grant of a stay of execution. The reasons must relate to the enforcement of the judgment. They must be deposed in the affidavit filed in support of the application.

**[11]** It is trite law, therefore, that the circumstances must be special, and neither ordinary, nor common.

## CONTENTIONS, FINDINGS, AND EVALUATION

**[12]** The defendant submitted that the basis for the stay is found in *Kosma Palm Oil*, where it was stated by Augustine Paul JCA (as he then was):

In *Rosengrens Ltd v Safe Deposit Centres Ltd* (unreported, 19 July 1984, CA, Lexis Nexis) Dillon LJ said:

> The most common special circumstance is, normally no doubt, that it would be doubtful whether, if the judgment was enforced, the defendant would get his money back if the appeal subsequently succeeded. But there are others as, for instance, *if there is a likelihood that the money the subject of the judgment, if paid over, would go to a foreign jurisdiction where the defendant would have difficulty recovering it.* (Emphasis added.)

**[13]** In the present case, it was undisputed that the plaintiff is a foreign company incorporated under the laws of the People's Republic of China ('China') without assets in Malaysia. There is no reciprocal enforcement of judgment agreement between China and Malaysia and this was evident from a perusal of the First Schedule to the Reciprocal Enforcement of Judgments Act 1958 ('the Reciprocal Enforcement of Judgments Act'). In my view, therefore, there was indeed a real risk that the defendant would not be able to recover the judgment sum from the plaintiff in China, in the event he is successful in the appeal.

**[14]** The plaintiff in resisting this application, relied on an article by Ronald A Brand, titled 'Recognition of Foreign Judgments in China: The Liu Case and the 'Belt and Road' Initiative' ('the article'), to contend that a Chinese court will consider several factors in determining whether to enforce a judgment. The plaintiff further submitted that the burden was on the defendant to show that, in the event he is successful in the appeal, it would be difficult for him to recover the judgment sum from the plaintiff in China.

**[15]** A perusal of the article, in my view, is indicative that there will in fact be difficulty in recovering the judgment sum, in the absence of a reciprocal enforcement of judgment agreement between China and Malaysia. This, therefore, falls neatly within the passage in *Rosengrens Ltd v Safe Deposit Centres Ltd* [1984] 3 All ER 198 endorsed by *Kosma Palm Oil,* and adopted in several other cases. The word 'difficulty' found in the passage in *Kosma Palm Oil*, did not indicate what level of difficulty it refers to. In attaching the ordinary meaning to the word 'difficulty', the defendant, in my view, had established special circumstances by virtue of the difficulty in having to recover the judgment sum from the plaintiff, in the event he is successful in the appeal.

**[16]** The plaintiff, had also relied on the Singapore Court of Appeal case of *BMI Building Material International GMBH v Roberto Building Material Pte Ltd* [1999] 2 SLR 39, to submit that the circumstances relied on by the defendant were not special, and should, therefore, be disregarded by this court.

**[17]** First and foremost, I am of the view that in an application for stay, all roads lead to *Kosma Palm Oil*. In any event, both parties had confirmed that the hearing of the appeal against the decision of this court in allowing the plaintiff's application for summary judgment, was scheduled for hearing at the Court of Appeal for March 2021. I was, therefore, of the view that the plaintiff would not suffer any prejudice by the granting of a stay. Furthermore, since the granting of a stay lies within the discretion of the court, taking into account the comparative effect on the parties, allowing this application, in my view, would be in the interest of justice.

CONCLUSION

**[18]** In the upshot, based on the aforesaid reasons, and after careful scrutiny of all the evidence before this court, both oral and documentary, and submissions of both parties, this application was allowed with costs in the sum of RM5,000 (subject to allocator fees).

*Application allowed with costs of RM5,000 subject to allocator fees.*

Reported by Izzat Fauzan